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No. 08-349

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GENERAL MOTORS CORPORATION,
Petitioner,

v.

BOYD BRYANT, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The Arkansas Supreme Court applied Arkansas's class-action jurisprudence to the issues raised in this interlocutory appeal to determine that, pursuant to Arkansas Rule of Civil Procedure 23, a choice-of-law analysis is not required pre-certification. Rather, the Arkansas Supreme Court determined that the choice-of-law analysis should be conducted subsequent to the initial class-certification stage of the litigation. The Questions Presented are:

1. Whether this Court has jurisdiction over a federal law question in a state interlocutory appeal that was not passed on by the state supreme court.

2. Whether the Federal Constitution overrides the Arkansas Supreme Court's class-action jurisprudence that is based on an Arkansas rule of procedure.

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INTRODUCTION

This case arises from an interlocutory appeal in a state court action involving a state supreme court's construction of a state procedural rule. General Motors ("GM") asked the Arkansas Supreme Court below to abandon its more than two decades of class-action jurisprudence to adopt the analysis applied by federal courts under Federal Rule of Civil Procedure 23. The Arkansas Supreme Court rejected GM's approach and, instead, applied its precedent derived from Arkansas Rule of Civil Procedure 23 to hold that Arkansas's class-action rule requires a choice-of-law analysis post-certification.

In construing Arkansas Rule 23, the Arkansas Supreme Court did not pass on a federal question. Rather, that court recognized that, once a final order is entered in this case, GM could challenge the circuit court's choice of law just as in any other case. The absence of any substantive choice-of-law determination by the court below should preclude a review of GM's substantive arguments raised in its petition. There is therefore no basis for this Court's review at this juncture of the case.

This Court's precedent provides that a particular state law may be applied to a nationwide class when that state has "'a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)). As GM concedes, this Court has not interpreted the Federal Constitution to mandate the timing of the choice-of-law analysis. *See* Pet. 18. Rather, this Court has held only that the Federal Constitution requires that

the choice-of-law analysis be conducted in a constitutional manner that is not arbitrary or fundamentally unfair. Because there has been no choice-of-law in this case, there is no basis for thinking that the Arkansas Supreme Court will apply any state law in a manner inconsistent with this Court's precedent.

For these reasons, which are discussed more fully below, this Court should deny GM's petition for writ of certiorari.

STATEMENT OF THE CASE

1. Factual Background

Relying primarily on admissions from GM's own documents, Plaintiff Boyd Bryant, a resident of Arkansas, brought this class action against GM in February 2005. Mr. Bryant, who owns a class vehicle, complains that the parking brakes on approximately four million model-year 1999 through 2002 GM pickup trucks and sport utility vehicles are defectively designed and that GM devised a cover up to avoid paying to remedy this defect. Mr. Bryant asserted that the parking brakes in all class vehicles contained a defect at the time of purchase, which immediately obligated GM to provide warranty remedies.

The class vehicles in this case include the 3,905,481 model-year 1999-2002, 1500 Series pickups and utilities vehicles equipped with automatic transmissions and with PBR 210x30 Drum-in-Hat parking systems that contain high-force spring clip retainers. Those vehicles contain defective parking brakes whose linings, by GM's own admission, do not adequately float inside the parking brake drum. This inadequate "float" problem, in turn, can cause

the parking brake to "self energize" and experience lining wear-out after only 2,500 to 6,500 miles in use. The trial court also recognized another potential defect in the parking brake system based on GM's admission that the design of the PBR 210x30 Drum-in-Hat parking brake system is "less than optimal because it is overly sensitive to proper lining-to-drum clearances." Pet. App. 48a.

Although GM discovered the parking brake defect in late 2000, and in October 2001 actually redesigned the high-force spring clip to improve lining float in model-year 2003 and forward vehicles, it inexplicably delayed until September 17, 2002, to release a consumer repair solution (a reduced-force spring clip retainer kit) via a service bulletin to dealers. In the service bulletin, GM said: "Important – the spring clip kits mentioned in this bulletin do not address any parking brake concerns." That statement is evidence that GM did not want to pay for the spring clip kits under its warranty and that GM felt no obligation to tell its customers that it thought it might be responsible for the parking brake failures.

GM's delay until early 2003 permitted the expiration of the three-year warranty period on many 1999 through 2000 model-year class vehicles and permitted expiration of the 36,000 mileage limit on many class vehicles, regardless of model year. GM's delay saved the company millions of dollars, given the uniform nature of the inadequate lining float defect across all class vehicles, and the parking brake functionality problems the defect can produce, even during initial months of vehicle ownership and use.

Finally, consistent with its strategy of delay and pursuit of cost-savings, GM waited until April 2005, which, perhaps not coincidentally, was only two

months after this lawsuit was filed against GM, to conduct a limited recall of the defective parking brakes. That recall, two months after this lawsuit was filed, was suspiciously narrow in scope. It involved only 63,497 manual-transmission versions of the class vehicles while ignoring the 3,905,481 automatic-transmission versions of those vehicles.[1] To date, GM refuses to accept any responsibility for any problem in the class vehicles.

It is obvious that parking brakes are necessary in the class vehicles, despite GM's orchestrated spin that they are not. Not only does federal law require parking brakes, but the applicable GM owner's manuals are rife with warnings that parking brakes must be used to supplement the hill-holding capabilities of the vehicles' automatic transmission.[2]

GM's actions give rise to numerous causes of action in favor of the class, including: (1) breach of express warranty; (2) breach of implied warranty of merchantability; (3) violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*; (4) common law unjust enrichment; (5) fraudulent concealment/ failure to disclose. Without limitation, these causes of action require a court and/or jury to address numerous factual and legal issues common both to Mr. Bryant and to all class members, as they all share the same common experiences.

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[1] Documents prepared by GM indicate that the cost to recall only vehicles with manual transmissions would be $6,645,793. The projected cost to recall both the manual and automatic transmission versions of the vehicles would have been 50 times greater, or $350,083,047.

[2] GM's own Vehicle Technical Specifications for the class vehicles specify, for example, that the parking brake *shall* hold the vehicle stationary at Gross Vehicle Weight with the transmission in neutral.

Mr. Bryant moved for class certification on July 14, 2006. Following a class-certification hearing, the trial court granted Mr. Bryant's motion for class certification in its January 11, 2007 order. Among other rulings, the trial court found that the common issues of law and fact predominated over any potential individual issues.[3] The trial court also determined that a choice-of-law analysis was not necessary pre-certification. GM subsequently appealed to the Arkansas Supreme Court.

2. Proceedings in the Court Below

From the trial court's order granting class certification, GM took an interlocutory appeal to the Arkansas Supreme Court pursuant to Rule of Appellate Procedure-Civil 2. That rule provides that the Arkansas Supreme Court has jurisdiction to review a trial court's order granting or denying class certification pursuant to Arkansas Rule 23. *See* Ark. R. App. P.-Civil 2(a)(9).

The Arkansas Supreme Court reviews the propriety of a class action as a procedural question and applies an abuse-of-discretion standard to determine whether the trial court's decision to certify a class

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[3] In its order, the trial court determined that the common issues predominated despite any individualized factors in part because "the alleged inadequate float problem appears to be something that is present in all class vehicles . . . because all class vehicles utilize" the same park brake system, and because GM "has admitted in numerous documents, with little or no equivocation, that the inadequate float problem regarding that brake system is a real one." Pet. App. 80a.

was an abuse of the trial court's discretion. *See, e.g.*, Pet. App. 5a.[4]

On appeal to the Arkansas Supreme Court, GM argued that the trial court erred by determining that, under Arkansas Rule 23, a choice-of-law analysis is not necessary prior to certification of a class. It was GM's contention that the predominance requirement of Rule 23 was not satisfied without the trial court first making a choice-of-law determination.

The Arkansas Supreme Court rejected GM's contention that Arkansas's class-action jurisprudence should require a choice-of-law analysis to be conducted prior to the certification of a class under Arkansas Rule 23.[5] Rather, that court relied on its previous holdings to determine that Arkansas's class-action jurisprudence does not require Arkansas trial courts to engage in a choice-of-law analysis prior to certifying a class.[6] The court added that "[it] has not

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[4] The Arkansas Supreme Court has consistently held that it reviews the propriety of a class action as a procedural question. *See, e.g.*, Pet. App. 6a. In reviewing a lower court's certification decision, it will not delve into the merits of the underlying claims to determine whether the procedural elements of Rule 23 have been satisfied. *Id.* at 6a. That court has said, "*a trial court may not consider whether the plaintiffs will ultimately prevail, or even whether they have a cause of action.*" *Id.*

[5] The court below referred to the trial court's four reasons for postponing the choice-of-law analysis, all of which are based on Arkansas's class-action jurisprudence. *See* Pet. App. 7a-8a.

[6] In reaching its conclusion, the Arkansas Supreme Court relied on its prior holdings. *See Security Benefit Life Ins. Co. v. Graham*, 810 S.W.2d 943 (Ark. 1991) (holding that the laws of 39 states relative to a defense need not be explored pre-certification); *FirstPlus Home Loan Owner 1997-1 v. Bryant*, No. 07-740, 2008 WL 518226 (Ark. Feb. 28, 2008) (to be reported at --- S.W.3d ---) (affirming the holding in *Security Benefit* that "the mere fact that choice of law may be involved in the

hesitated to affirm a finding of predominance so long as a common issue to all class members predominated over individual issues." Pet. App. 14a. In this case, the court found that two common questions could be answered before determining any individual issues: (1) "[w]hether or not the class vehicles contain a defectively designed parking-brake system" and (2) "whether or not GM concealed that defect." *Id.* at 9a.

The Arkansas Supreme Court held that neither Arkansas's class-action jurisprudence nor the predominance requirement of Rule 23 requires a choice-of-law analysis to be conducted pre-certification. The Arkansas Supreme also discarded GM's claim that the "failure to require such an analysis precertification allows an analysis to evade review." *Id.* at 14a. That is because, the court determined, "[u]pon a final order by the circuit court, GM would be able to challenge the circuit court's choice of law, just as in any other case." *Id.*

Because the Arkansas Supreme Court found that GM would have the opportunity to raise its challenge with respect to a choice-of-law determination in an appeal of the trial court's final order in this case, the Arkansas Supreme Court's decision determined only matters pertaining to an Arkansas rule of procedure and did not address or pass on any federal questions in its opinion.

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case of some parties living in different states is not sufficient in and of itself to warrant a denial of class certification").

REASONS FOR DENYING THE PETITION

I. AN INTERLOCUTORY APPEAL CONCERNING A STATE SUPREME COURT'S INTERPRETATION OF A STATE RULE OF CIVIL PROCEDURE IS NOT REVIEWABLE BY THIS COURT

A. The Arkansas Supreme Court Did Not Pass on a Federal Issue

1. This Court Requires that Claims Raised in a Petition for Writ of Certiorari Be Properly Presented to or Passed on by the State Supreme Court

In reviewing state court judgments under 28 U.S.C. § 1257, this Court will not consider a petitioner's federal claim that was not addressed by, or properly presented to, the state court that rendered the decision the petitioner is asking this Court to review. *See Adams v. Robertson*, 520 U.S. 83, 88 (1997) (denying certiorari where the petitioners presented an issue that had not been passed on by the state supreme court).[7]

That rule, according to this Court, serves an important interest of comity because "it would be unseemly in our dual system of government to disturb the finality of state officials, and, equally important, proposed changes that could obviate any challenges to state action in federal court." *Id.* at 90. This Court also observed that "[r]equiring parties to raise issues below not only avoids unnecessary adjudication in

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[7] Under Section 1257(a), Congress has expressly limited this Court's review of state court decisions to only those final judgments or decrees entered by the highest courts of a state "where the validity of a statute of any State is drawn in question on the ground of it being repugnant to the Constitution or laws of the United States."

this Court by allowing state courts to resolve issues on state-law grounds, but also assists [this Court] in [its] deliberation by promoting the creating of an adequate factual and legal record." *Id.* at 90-91.[8]

In *Adams*, a class-action settlement case, this Court observed that the Alabama Supreme Court had not expressly ruled on the question for which this Court granted certiorari—whether Alabama's rules governing class-action settlements satisfy the requirements of due process.[9] This Court emphasized its assumption that, when a state court is silent on a federal question, "the issue was not properly presented." *Id.* at 86. The party appealing to this Court thus bears the burden of overcoming this Court's assumption by demonstrating that the state court had "a fair opportunity to address the federal question that it sought to be presented here." *Id.* at 87 (internal quotations omitted).

Similar to GM here, the petitioners in *Adams* argued to this Court that Alabama's class-action rules violated the Due Process Clause of the United States Constitution. That issue, however, had not been properly raised or passed on by the Alabama

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[8] This Court also said the petitioner's proper presentation of their due process challenge to the state supreme court coupled with that court's decision to pass on that issue would have assisted this Court in understanding that state's rules "as a predicate to [its] assessment of their constitutional adequacy." *Adams*, 520 U.S. at 91.

[9] In deciding it had improvidently granted certiorari in *Adams*, this Court stated that, as a result of the respondents' failure to file a brief in opposition to the petition, they failed to satisfy their obligation to object to certiorari on the grounds that the petitioners' question presented had not been properly raised or addressed by the Alabama Supreme Court. 520 U.S. at 91.

Supreme Court. This Court, therefore, held that certiorari had been improvidently granted. *Id.* at 92.

In dismissing the petitioners' writ, the *Adams* Court observed that the petitioners failed to adequately present the constitutional issue to the Alabama Supreme Court. The petitioners merely mentioned their constitutional claim in the context of an argument that was entirely different from the one made to this Court. This Court pronounced that the mere "discussion of a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim." *Id.* at 88 (internal quotations omitted).

Not only did the petitioners in the *Adams* case fail properly to develop the constitutional issue in their opening brief, but in their reply brief to the state supreme court they also neglected to respond to the respondents' federal due process argument. *Id.* at 89. Instead, the focus of the petitioners' argument was based on the Alabama Constitution.

As the *Adams* petitioners did not meet their burden to prove that they had properly raised the constitutional issue to the state supreme court below, this Court found that, in the circumstances of that case, "it would have been perfectly reasonable for a state court to conclude that the broader federal claim was not before it." *Id.* In reaching that conclusion, this Court recognized Alabama Supreme Court's "undeniable interest in having the opportunity to determine in the first instance whether its existing rules governing class-action settlements satisfy the requirements of due process, and whether to exercise its power to amend those rules to avoid potential constitutional challenges." *Id.* at 90.

2. The Arkansas Supreme Court Did Not Pass on a Federal Question

Like the state court in *Adams*, the Arkansas Supreme Court here did not rule on an issue of constitutional import concerning Arkansas's rules of procedure governing class actions. Rather, the Arkansas Supreme Court's decision concerned only Arkansas Rule 23. In interpreting Arkansas Rule 23 as requiring a choice-of-law analysis post-certification, the Arkansas Supreme Court recognized that, "[u]pon a final order by the circuit court, GM would be able to challenge the circuit court's choice of law, just as in any other case." Pet. App. 14a. Because the Arkansas Supreme Court did not pass on a constitutional issue in this interlocutory appeal, this Court should presume that petitioner failed properly to present the issue raised here to the Arkansas Supreme Court.

GM's arguments to the Arkansas Supreme Court confirm that presumption. In fact, GM cannot demonstrate that the Arkansas court had a fair opportunity to address the federal question for three reasons. First, as did the *Adams* petitioners, GM's opening brief below merely referred to a federal constitutional due process argument in the context of its main point that Arkansas Rule 23 should require a choice-of-law analysis pre-certification.[10]

Second, GM abandoned its frail federal constitutional claim in its reply brief. In fact, other than a cursory comment that due process requires consid-

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[10] In its brief below, GM articulated four challenges to the trial court's certification order. The federal constitutional component of GM's argument was merely an aside to one of those main points. In fact, GM dedicated only one paragraph and one sentence to a federal issue in its opening brief.

eration of choice-of-law issues pre-certification, GM made no mention of a federal claim. Like the petitioners in *Adams*, who in their reply brief to the Alabama Supreme Court focused only on the Alabama Constitution, GM focused only on an Arkansas rule of procedure in its attempt to convince the Arkansas court to modify that rule.

Third, not only did GM fail adequately to present a federal constitutional argument to the Arkansas Supreme Court in its briefs on appeal, but GM also failed to file a petition for rehearing to the Arkansas Supreme Court, thereby waiving its final opportunity to request that the Arkansas Supreme Court pass on a federal issue in the interlocutory appeal.[11] If GM was confident that it had raised a federal question that the Arkansas court neglected to decide, then GM could have filed a petition for rehearing to address the Court's decision not to pass on GM's undeveloped federal question.

As it did in *Adams*, this Court should find that GM failed to satisfy its burden to demonstrate that it properly raised the constitutional issue to the state supreme court below. Therefore, it was perfectly reasonable for the Arkansas Supreme Court to conclude that the broader federal claim was not before it. *See Adams*, 520 U.S. at 89. This Court's rationale in *Adams* is equally applicable here, as the Arkansas Supreme Court has an "undeniable interest in having the opportunity to determine in the first instance whether its existing rules governing" class-action lawsuits filed in state court "satisfy the requirements of due process, and whether to exercise its power to

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[11] Arkansas Supreme Court Rule 2-3(g) allows parties to file a petition for rehearing in order "to call attention to specific errors of law or fact which the opinion is thought to contain."

amend those rules to avoid potential constitutional challenges." *Id.* at 90.

Having not had it presented squarely as a point for reversal, the Arkansas Supreme Court did not make a direct ruling on any federal constitutional argument in its opinion. Thus, GM has waived review of this issue by failing to address it to the Arkansas Supreme Court and by failing to obtain a ruling on its federal constitutional argument below.

B. There Has Been No Final Order in this Case, Which Arises from an Interlocutory Appeal

Congress has expressly limited this Court's review of state court decisions to only those *final* judgments or decrees entered by the highest courts of a state "where the validity of a statute of any State is drawn in question on the ground of it being repugnant to the Constitution or laws of the United States." 28 U.S.C. § 1257(a).

GM's petition arises from an order by the Arkansas Supreme Court in an interlocutory appeal. There has been no final judgment with respect to any of the plaintiffs' claims or any of GM's defenses. Thus, the Arkansas Supreme Court's order interpreting Arkansas Rule 23 is not a final order reviewable by this Court in a certiorari petition. *See id.*[12]

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[12] Section 1257(a) provides that this Court may review final judgments rendered by state supreme courts where "the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

Rather, the Arkansas Supreme Court, as the final authority on an Arkansas rule of civil procedure, interpreted Arkansas Rule 23 in a manner consistent with Arkansas's class-action jurisprudence. As no other state or federal court has the authority to preside over an Arkansas rule of civil procedure, the Arkansas Supreme Court's decision in this case does not conflict with the decision of any other jurisdiction. Furthermore, because the court below made no ruling with respect to a constitutional or federal question, the order entered by that court does not conflict with a ruling of this (or any other) Court.

C. There Is No Exception Permitting this Court's Review of the Non-Final Order

As the petition arises from an interlocutory appeal, this Court will consider granting certiorari only under narrow exceptions to its jurisdiction set out in Section 1257(a). *See* note 12, *supra*. Under those narrow exceptions, a state court's judgment must represent the final word within the state court system on a federal issue, and the failure of this Court immediately to review that issue must present a risk of seriously eroding federal policy. That exception is simply not supported by the facts here.

This Court has squarely ruled that a district court's grant or denial of a class-action certification is not appealable as a matter of right under 28 U.S.C. § 1291. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978) (observing the rule that "a district court's order denying or granting class status is inherently tentative"). In *Coopers & Lybrand*, this Court considered the petitioners' request for this Court to review a district court's order decertifying a class. This Court observed that "[f]ederal appellate

jurisdiction generally depends on the existence of a decision by the [lower court] that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Id.* at 467 (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

In *Coopers & Lybrand*, this Court determined that neither the "collateral order" exception nor the "death knell" doctrine would apply to circumvent the final-judgment rule in a case where the lower court denied class certification. *Id.* at 476-77.

Concerning the collateral-order exception, this Court said that, in order to come within the small class of decisions excepted from the final-judgment rule, the lower court's order must have "conclusively determine[d] the disputed question, resolve[d] an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Id.* at 468. Thus, an order denying class certification does not fit within this exception in part because such an order is subject to revision and it is subject to effective review after a final judgment. *Id.* at 469.

This Court also found that the death-knell doctrine did not apply to except an order denying class certification from the final-judgment rule. In so ruling, this Court considered that "even adherents of the 'death knell' doctrine acknowledge that a refusal to certify a class does not fall in the limited category of orders which, though nonfinal, may be appealed without undermining the policies served by the general rule." *Id.* at 471. According to this Court, "[i]t is undisputed that allowing an appeal from such an order in the ordinary case would run 'directly contrary to the policy of the final judgment rule embodied in 28 U.S.C. § 1291 and the sound reasons for it.'"

Id. (quoting *Korn v. Franchard Corp.*, 443 F.2d 1301, 1305 (2d Cir. 1971)).

The posture of this case is very similar to that presented to this Court in *Coopers & Lybrand*. Here, the class was certified by the trial court pursuant to Arkansas Rule 23. GM availed itself of a state court rule permitting an interlocutory appeal of the lower court's certification decision, and the certification order was thereby reviewed and affirmed by the Arkansas Supreme Court. Although *Coopers & Lybrand* arose from a federal court's decision, its track was somewhat parallel to the procedural posture here.

Just as in *Coopers & Lybrand*, there is no finality in this case to justify this Court's review, as there has been no final adjudication of the plaintiffs' claims or GM's defenses at this class-certification stage of the litigation.[13] Just as this Court explained in

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[13] In *Coopers & Lybrand*, this Court explained the important rationale behind its jurisdictional limitations by quoting from the unanimous decision by this Court in *Cobbledick v. United States*:

> Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.

Coopers & Lybrand, 437 U.S. at 468 (quoting *Cobbledick v. United States*, 309 U.S. 323, 325 (1940)).

Coopers & Lybrand, the order in this case clearly may be altered or amended prior to a decision on the merits, making it an "inherently tentative" order. 437 U.S. at 469 n.11. Absent a final order or any basis for excepting this case from the Court's final-judgment rule, this Court should deny GM's petition.

Furthermore, GM's arguments under this section concerning the trial plan in this case and the settlement pressure of certification do not justify any exception to the final-judgment rule.

GM's argument that the trial plan in this case is unworkable is specious, at best. *See* Pet. 10. Not only was an issue regarding the trial plan not raised to the Arkansas Supreme Court, but such an issue would not have been proper for that court's review in an interlocutory appeal under Arkansas Rule of Appellate Procedure-Civil 2. GM should first raise its concerns about the trial plan to the trial court. Only after a final order is entered by the trial court will such an issue be proper for an appeal. *See Coopers v. Lybrand*, 437 U.S. at 470 (explaining that the special rules governing class actions do not contain any unique provisions governing appeals, as "[t]he appealability of any order entered in a class action is determined by the same standards that govern appealability in other types of litigation").

GM's notion that the certification of the class in this case creates tremendous settlement pressure should have no bearing on whether this Court exercises jurisdiction over this case. Furthermore, its assertion is not support for this Court to find that any of the narrow exceptions to the final-judgment rule should apply. GM's contention is essentially a request for this Court to expand the Federal Constitution based on an allegation of "settlement pres-

sure." Pet. 11. In order to obtain a final order that will be reviewable by the appellate courts, as did the defendant in *Shutts*, GM must also choose to refrain from settling with plaintiffs. GM's decision concerning whether to settle with plaintiffs at any stage in this litigation, however, is surely not reason enough to alter the United States Constitution or this Court's final-judgment rule.

II. THE ARKANSAS SUPREME COURT'S INTERPRETATION OF RULE 23 OF THE ARKANSAS RULES OF CIVIL PROCEDURE IN THIS INTERLOCUTORY APPEAL DOES NOT VIOLATE THE FEDERAL CONSTITUTION

The constitutional requirement that the choice of law be neither arbitrary nor unfair does not mandate that the choice-of-law analysis be conducted pre-certification. There has been no choice-of-law analysis conducted in this case. Rather, the Arkansas Supreme Court determined that Arkansas Rule 23 does not require lower courts to engage in a choice-of-law analysis pre-certification. As such, the Arkansas Supreme Court's decision is consistent with the Federal Constitution because: (A) the Federal Constitution does not require that a choice-of-law analysis be conducted prior to the certification of a nationwide class; (B) the Arkansas Supreme Court is the final arbiter with respect to an Arkansas rule of civil procedure; thus, there is no split among jurisdictions with respect to Arkansas Rule 23.

A. The United States Constitution Does Not Require that a Choice-of-Law Analysis Be Conducted Prior to the Certification of a Nationwide Class

1. The *Allstate* and *Shutts* Decisions

This Court's precedent concerning nationwide class-action lawsuits is clear—in the context of such a case, the constitutional limitations established by this Court in *Allstate* and *Shutts* must be observed. In both cases, this Court viewed its role as the arbiter of whether the *choice* of law itself was made in a constitutionally permissible manner—that is, whether the choice of law was "arbitrary or unfair." *Allstate*, 449 U.S. at 307 n.6 (recognizing that "only issue" before Court was whether choice of law was constitutional).

The constitutional limitations established in *Shutts* and *Allstate* plainly require that, for a state's law to apply to a nationwide class, that state must have "a significant contact or aggregation of contacts, creating state interests, such that choice of law is neither arbitrary nor fundamentally unfair." *Shutts*, 472 U.S. at 818; *see Allstate*, 449 U.S. at 307 (holding that the application of a particular state's law must "not [be] so arbitrary and unreasonable as to violate due process") (internal quotations omitted).

Although not a class-action case, the *Allstate* decision provided a foundation for the constitutional limitations that this Court later applied to the nationwide class action in *Shutts*. In *Allstate*, this Court affirmed the Minnesota Supreme Court's decision to apply Minnesota law in a case involving Minnesota residents, one of whom was killed in an automobile accident in Wisconsin. In that decision, this Court established the rule as derived from this Court's

precedent that, "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." 449 U.S. at 312-13.[14]

This Court applied that constitutional principle to the facts presented in *Allstate* and concluded that Minnesota Supreme Court's choice of its own law did not offend the Federal Constitution. That decision was based on three contacts Minnesota had with the parties and the occurrence that gave rise to the litigation. The first of those contacts was the decedent, who was a member of Minnesota's work force for 15 years preceding his death. The second of those contacts was the defendant, Allstate, which was at all times present and doing business in Minnesota. The third contact was the respondent, who became a Minnesota resident prior to filing suit.

This Court held that, because "Minnesota had a significant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of its law was neither arbitrary nor fundamentally unfair." *Id.* at 320. Therefore, the choice of Minnesota law by the Minnesota Supreme Court was not contrary to the Due Process Clause or the Full Faith and Credit Clause of the United States Constitution.

In *Shutts*, this Court applied the *Allstate* holding to find that, in the context of a nationwide class action, the application of Kansas law to every claim in the

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[14] Although *Allstate* was a plurality, this Court recognized in *Shutts* that even the dissenting Justices were "in substantial agreement with this principle." *Shutts*, 472 U.S. at 818-19.

case was "sufficiently arbitrary and unfair as to exceed constitutional limitations." 472 U.S. at 798. The problem with the Kansas Supreme Court's choice of law in *Shutts* was that Kansas did not have an "interest" in the claims that were unrelated to that state. *Id.*

This Court reaffirmed its observation in *Allstate* that "in many situations a state court may be free to apply one of several choices of law," but also observed that the constitutional limitations laid down in the *Allstate* case "must be observed even in a nationwide class action." *Id.* at 823. Thus, this Court concluded that, for the Kansas court constitutionally to choose Kansas law to apply to a nationwide class, "Kansas must have a 'significant contact or aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of Kansas law is not arbitrary or unfair." *Id.* at 821 (quoting *Allstate*, 449 U.S. at 312-13). Because this Court found that Kansas did not have the necessary contacts with the plaintiffs' claims, this Court held that the Kansas Supreme Court's choice of Kansas law was unconstitutional.

2. The Arkansas Supreme Court Decision Did Not Violate the Constitutional Principle Established in *Allstate* and *Shutts*

Despite GM's unremitting assertion that this Court's precedent—particularly this Court's *Shutts* decision—requires that a choice-of-law analysis be conducted pre-certification, GM concedes that this Court has, in fact, never mandated that result. *See* Pet. 18 (conceding that "this Court has yet to speak

directly to whether a choice of law analysis is constitutionally required at the certification stage").

In this case, GM asks this Court to review the Arkansas Supreme Court's decision in an interlocutory appeal to interpret an Arkansas rule of civil procedure based on Arkansas's class-action jurisprudence. If the posture of this case is not enough to prevent this Court from accepting jurisdiction at this stage, then the fact that there has been no substantive choice-of-law determination should preclude a review of GM's argument under this point.

While GM attempts to convince this Court that the Arkansas Supreme Court chose "to ignore the choice of law issue" (Pet. 14), even a cursory review of the decision below reveals that allegation to be false. Rather than ignore the choice-of-law issue, the Arkansas Supreme Court devoted a substantial portion of its opinion to analyzing the precise issue raised to that court in the interlocutory appeal: whether, under Arkansas Rule 23, a choice-of-law determination is required pre-certification.

The Arkansas Supreme Court decided that, based on Arkansas's class-action jurisprudence, a choice-of-law analysis should not be conducted prior to certification of the class. *See* Pet. App. 12a (finding that "any potential choice-of-law determination and application [is] similar to a determination of individual issues, which cannot defeat certification" under Arkansas Rule 23).[15]

The Arkansas Supreme Court likewise did not ignore the approach of other jurisdictions, which do

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[15] Like the Arkansas Supreme Court, the trial court below did not ignore the choice-of-law issue. *See* Pet. App. 85a-86a, 94a.

require a choice-of-law analysis pre-certification. Instead, that court acknowledged its rejection of the approach of other jurisdictions: "we are simply not persuaded by the reasoning of these courts as we have previously rejected any requirement of a rigorous-analysis inquiry by our circuit courts." *Id.* at 13a.

Rather than require the rigorous-analysis approach applied under Federal Rule 23 that requires a choice-of-law analysis pre-certification, the Arkansas Supreme Court reaffirmed its longstanding precedent that Arkansas law affords its trial courts "broad discretion in determining whether the requirements for class certification have been met," while recognizing that a class can always be decertified in the future, if necessary. *Id.*; *see also* Ark. R. Civ. P. 23(b) ("An order under this section may be altered or amended at any time before the court enters final judgment.").

The Arkansas Supreme Court also rejected GM's claim that a failure to require a choice-of-law analysis pre-certification would allow that analysis to evade review. That is because, according to the Arkansas Supreme Court, "[u]pon a final order by the circuit court, GM would be able to challenge the circuit court's choice of law, just as in any other case." Pet. App. 14a. In *Shutts*, for example, the Kansas Supreme Court reviewed the choice-of-law decision of a Kansas trial court only after that lower court had rendered a final order, and not in the context of an interlocutory appeal. 472 U.S. at 814-16 (observing that the Kansas trial court had applied

Kansas law to the class members' claims to find the defendant liable).[16]

Just as in *Shutts*, following a final determination by the trial court as to GM's liability in this case, either party could appeal the trial court's choice-of-law determination to the Arkansas Supreme Court and then to this Court. GM presents no convincing reason why the Arkansas Supreme Court's ruling that it would review the lower court's choice-of-law decision following a final order in this case would necessarily mean that the choice-of-law decision would evade the review of the appellate courts.

In rejecting GM's assertion that Arkansas Rule 23 should require a choice-of-law analysis pre-certification, the Arkansas Supreme Court also relied in part on its finding that, "were [it] to require the circuit court to conclude at this time precisely which law should be applied, such a decision could potentially stray into the merits of the action itself, which we have clearly stated shall not occur during the certification process." Pet. App. 14a. It is certainly within the purview of the Arkansas Supreme Court to rely on its more than two decades of class-action jurisprudence when interpreting Arkansas Rule 23.

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[16] In *Shutts*, the Kansas trial court certified a final class consisting of 28,000 members residing in all 50 states, the District of Columbia, and several foreign countries. 472 U.S. at 797. Prior to review by the Kansas Supreme Court, the trial court applied Kansas contract and equity law to every class member's claim to find the defendant liable. It was only after the trial court's final determination of liability that the Kansas Supreme Court reviewed the choice-of-law decision and affirmed the lower court. *Id.* at 814-16. Upon review by this Court, that decision was reversed because the Kansas Supreme Court's choice of law was arbitrary and, therefore, unconstitutional.

See, e.g., Mega Life & Health Ins. Co. v. Jacola, 954 S.W.2d 898, 900 (Ark. 1997) (recognizing that "neither the trial court nor the appellate court may delve into the merits of the underlying claim when determining whether the requirements of Rule 23 have been satisfied").

GM not only has failed to show how the Arkansas Supreme Court committed reversible error in this case, but also has failed to demonstrate how the decision below is contrary to the principles established in *Shutts* and *Allstate*. As previously discussed, *Shutts* and *Allstate* require lower courts to apply a choice-of-law analysis in a constitutional manner, meaning that the choice of law itself must not be arbitrary or fundamentally unfair. Those constitutional principles apply to the actual substantive choice-of-law decision and not to a state's procedural rules governing how class actions are brought and managed within that state.

Until a choice-of-law decision has been made in this case, any opinion by this Court concerning what that choice of law should be is merely advisory.

3. This Court's *Amchem* Decision Does Not Mandate a Choice-of-Law Analysis Pre-Certification

Not only is GM's reliance on *Shutts* and *Allstate* unconvincing, but its dependence on *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), offers no basis for a reversing the decision below.[17] First,

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[17] The settlement class in *Amchem* was certified by. the United States District Court for the Eastern District of Pennsylvania and later decertified by the United States Court of

federal rules of procedure, and not Arkansas rules of procedure, governed the procedural aspects surrounding the certification and subsequent decertification of the class in the *Amchem* case. The decisions of federal courts concerning the application of Federal Rule 23 are not binding on the Arkansas Supreme Court, which is the final arbiter of Arkansas's procedural rules.

Second, the settlement class in *Amchem* bears little, if any, resemblance to the certified class in this case. The *Amchem* settlement class consisted of class members who were exposed to asbestos-containing products. Not only were those class members "exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods," 521 U.S. at 624, but the class members had suffered varying degrees of physical injury as a result of that exposure. They also differed in that each class member had a different history of cigarette smoking. Based on all those differences between the class members, the Third Circuit observed that the differences in state laws would also compound those disparities.

The class certified in this case is entirely different from the class in *Amchem*. As the court below found, two common issues in this case predominate over any other potential individualized issue: (1) "whether the parking-brake system installed in the class members' vehicles was defective" and (2) "whether GM attempted to conceal any alleged defect." Pet. App. 17a.

The Arkansas Supreme Court reiterated its previous holding that "the mere fact that individual issues

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Appeals for the Third Circuit, which this Court affirmed. *See Amchem*, 521 U.S. at 629.

and defenses may be raised by the defendant regarding the recovery of individual class members cannot defeat class certification where there are common questions concerning the defendant's alleged wrongdoing that must be resolved for all class members." *Id.* at 17a-18a. In contrast to *Amchem*, the common issues concerning the defendant's alleged wrongdoing predominate in this case.[18]

Third, there had been a choice-of-law determination made by a lower federal court prior to this Court's review of *Amchem*. After discussing the disparities among the plaintiff members of the settlement class in *Amchem*, this Court acknowledged the Third Circuit's choice-of-law discussion by noting that it had observed that the "[d]ifferences in state law . . . compound these disparities." 521 U.S. at 624. In applying a rigorous analysis pursuant to federal class-action jurisprudence in accord with Federal Rule 23, the Third Circuit determined that the laws of many states would apply to that case, further compounding the individualized issues.

Different from *Amchem*, in this case, there has been no determination as to which state's or states' laws might apply given the facts presented here. Because there has been no choice-of-law determination made below, a decision from this Court concerning such an analysis is premature. Further, simply because this Court acknowledged that the choice-of-

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[18] In its 51-page opinion, the trial court found that "the high-force spring clip retainer, if it is indeed defectively designed (an issue ultimately to be determined by the trier of fact), to create a common, inadequate shoe/lining float problem in all class vehicles, which is persistent, which occurs each time a class vehicle is driven, and which exists, if at all, from the time class vehicles roll off their respective assembly lines." Pet. App. 45a; *see also id.* at 48a.

law discussion was one of the reasons why the Third Circuit chose to decertify a class that was brought under Federal Rule 23 does not lead to the conclusion that this Court mandates a choice-of-law determination during the certification stage of a class-action lawsuit brought pursuant to Arkansas Rule 23. As GM conceded in its petition, "this Court has yet to speak directly to whether a choice of law analysis is constitutionally required at the certification stage." Pet. 18.

GM also contends that the failure of the Arkansas Supreme Court to require a choice of law pre-certification means that the notice that eventually will be sent to class members will necessarily be insufficient. Not only is this argument not persuasive, it is improper at this preliminary stage of the litigation.

Pursuant to Arkansas Rule of Appellate Procedure-Civil 2, the Arkansas Supreme Court has jurisdiction only to consider whether the circuit court abused its discretion in choosing whether to certify the class. *See, e.g.*, Pet. App. 5a. A challenge to the notice requirement of Arkansas Rule 23 should be made in the form of an argument to the trial court rather than in the form of speculations tagged onto an interlocutory appeal concerning class certification. In making this argument, GM seeks an advisory opinion with respect to an issue that is not yet ripe for this Court's consideration.

B. The Arkansas Supreme Court Is the Final Arbiter with Respect to an Arkansas Rule of Civil Procedure; Thus, There Is No Split Among Jurisdictions with Respect to Arkansas Rule 23

Notwithstanding GM's complaint to the contrary, there is not a true "split among the courts" (Pet. 18) on the issue presented in this petition. The issue presented here is the interpretation of Arkansas Rule 23 and the application of Arkansas's class-action jurisprudence based on that rule.

Arkansas courts are simply not obligated to apply Federal Rules to cases arising in state courts. The state rules of procedure apply to this case, which was brought in state court. And, because the Arkansas Supreme Court is the final arbiter concerning an Arkansas rule of civil procedure, there is no true "split" among authority presented here. GM's argument in favor of this Court granting its petition is, therefore, unpersuasive.[19]

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[19] None of the cases cited by GM refer to Arkansas Rule 23. Rather, all but two of those cases are federal court decisions applying Federal Rule 23. *See* Pet. 19 n.8. Concerning GM's citations to two state court decisions, it is notable that, unlike how the Arkansas Supreme Court interprets Arkansas Rule 23, those courts apply a rigorous analysis when interpreting their Rule 23 that is consistent with the analysis applied to Federal Rule 23. *See* Ala. Code § 6-5-641(e) (1975) (requiring a rigorous analysis under Alabama's Rule 23); *see also Washington Mut. Bank, FA v. Superior Court*, 15 P.3d 1071, 1085 (Cal. 2001) (adopting Federal Rule 23's approach of requiring a choice-of-law analysis pre-certification). Neither was Arkansas Rule 23 involved in any case cited by GM as consistent with Arkansas's approach to the timing of the choice-of-law analysis. *See* Pet. 20 n.9.

C. The Laws of Multiple States Will Not Necessarily Be Applied to the Claims Raised in this Case; the Differences in State Laws Are Speculative in Light of the Fact that There Has Been No Choice-of-Law Decision at this Stage in the Litigation

GM's argument (Pet. 21-31) presupposes a conclusion to a choice-of-law analysis that is yet to be conducted by any court. GM wishes to convince this Court that the law of every state will necessarily apply. Arguably, the law of only one state could be applied in a constitutionally permissible manner, similar to the application of Michigan law by the Oklahoma Supreme Court in *Ysbrand v. Daimler-Chrysler Corp.*, 81 P.3d 618 (Okla. 2003), *cert. denied* 542 U.S. 937 (2004) (holding that the application of Michigan law to some of the claims of a nationwide class was consistent with *Shutts* because there was a significant aggregation of contacts with this case to Michigan so that the application of Michigan law to the nationwide class action presented was not arbitrary or fundamentally unfair).

Because no choice-of-law determination has been made by a court in this case, an argument concerning which law will be applied is merely speculative. Therefore, the allegations made by GM here do not support GM's attempt to have this Court grant its petition.

III. THE QUESTIONS PRESENTED HERE ARE OF DIMINISHING SIGNIFICANCE IN LIGHT OF THE CLASS ACTION REFORM ACT OF 2005

This case was filed in Arkansas state court prior to Congress's passage of the Class Action Fairness Act of 2005 ("CAFA"). Congress implemented CAFA to expand the jurisdiction of federal courts over many large class-action lawsuits. *See* 28 U.S.C. §§ 1332(d), 1453, 1711-1715. As a practical matter, under CAFA, most if not all nationwide class-action lawsuits will be removed to federal court.

In light of CAFA's comprehensive congressional reform to class-action litigation, any question raised by GM in this case is one of diminished significance, as CAFA has largely eliminated state court jurisdiction over large class-action cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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